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In The

Supreme Court of the United States

October Term, 1995

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

YUEH-SHAIO YANG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Attorney General, when deciding whether to grant the family waiver of deportation under § 241(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(H), may take into account actions that the alien took as part of the same scheme before and after his fraudulent entry into the United States.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	v
Statement of Facts	1
A. Introduction	1
B. Relevant Evidence Adduced at the Deportation Hearing	1
C. Evidence Relied Upon By The Immigration Judge	4
D. Evidence Relied Upon By The Board Of Immigration Appeals	5
E. Evidence Relied Upon By The Ninth Circuit	5
Summary of Argument	6
Argument	7
I. The Historical Development Of The § 241(a)(1)(H) Family Waiver Does Not Support The Government's Interpretation Of The Statute; Congress Did Not Grant The Attorney General Broad Discretion To Determine Which Cases Of Initial-Fraud Entry Merit A Waiver Of Deportation.	7

	Page
A. The First Appearance Of The Family Waiver And The "Initial Fraud" Construction Of "Otherwise Admissible"	7
B. Expansions Under The 1981 Amendments	12
C. Further Expansion By The 1990 Amendments	18
II. The Initial Fraud Concept Is Required By Statute; Its Application Is Not A Revocable Policy Adopted By The BIA As A Matter Of Leniency.	19
A. In *INS v. Errico*, This Court Already Determined That The Initial Fraud Concept Is Required By The Statute	20
B. The Introduction Of Discretion To § 241(f) In 1981 Was Directed At The Broadened Subject Matter Of The Waiver	21
C. The Initial-Fraud Concept Stems From The Plain Language Of The Statute	23
D. Given The Stakes, Any Doubt As To The Proper Construction Of The Statute Should Be Resolved In The Alien's Favor.	27
III. The Board Of Immigration Appeal's Interpretation Of Initial Fraud Is Inappropriately Narrow.	28

A. The BIA's Consideration Of Respondent's Entry As "The Purported Beneficiary Of A United States Citizen" And His Participation In "Another Sham Divorce To Attempt To Rectify His Wife's Initial Fraud" Was Reversible Error. 29

B. Under The Initial-Fraud Concept, The Ingredients Of The Scheme Should Be Considered Part Of The Fraud That Triggers § 241(a)(1)(H) Relief. 31

C. When The Initial Fraud Involves A Change In Identity, Subsequent Acts That Involve The Change In Identity Should Not Be Regarded As Independent Acts Of Fraud. 33

D. Arguments That Specific Interpretations Would Give Rise To Anomalous Results Are Not Germane. 36

IV. The Government's Analogies To Other Waivers And Discretionary Relief Are Misplaced. 38

V. Affirming The Ninth Circuit's Decision Will Have No Effect On The Regulation Of Naturalization Cases. 42

Conclusion 44

TABLE OF CITATIONS

Cases Cited:

Bridges v. Wixon, 326 U.S. 135 (1945) 44

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984) 20

Delmundo v. INS, 43 F.3d 436 (9th Cir. 1994) 35

Escobar Ordonez v. INS, 526 F.2d 969 (5th Cir. 1976) .. 14

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 23, 27

INS v. Elias-Zacarias, 502 U.S. 478 (1992) 23

INS v. Errico, 385 U.S. 214 (1966) 9, 11, 12, 16, 20, 28

INS v. Hector, 479 U.S. 85 (1986) 23

INS v. Jong Ha Wang, 450 U.S. 139 (1981) 41

INS v. Phinpathya, 464 U.S. 183 (1984) 23

INS v. Rios-Pineda, 471 U.S. 444 (1985) 42

Jen Hung Ng v. INS, 804 F.2d 534 (9th Cir. 1986) 35

Liwanag v. INS, 872 F.2d 685 (5th Cir. 1989) 26

Page

Matter of Alonzo, 17 I. & N. Dec. 292 (Comm'r 1979) . 26

Matter of Anabo, 18 I. & N. Dec. 87 (BIA 1981) 14

Matter of B- and P-, 2 I. & N. Dec. 638 (1947) 9

Matter of Marin, 16 I. & N. Dec. 581 (BIA 1978) 3, 9, 41

Matter of Montemayor, 15 I. & N. Dec. 353 (BIA 1975) 14, 15

Matter of Silva, 17 I. & N. Dec. 288 (Comm'r 1979) ... 26

Matter of Sosa-Hernandez, 20 I. & N. Dec. 758 (BIA 1993) 16

Ng Fung Ho v. White, 259 U.S. 276 (1922) 44

Reid v. INS, 420 U.S. 619 (1975) 12, 13, 14

United States ex rel. Pon v. Esperdy, 296 F. Supp. 726 (S.D.N.Y. 1969) 36

Yik Shuen Eng v. INS, 464 F.2d 1265 (2d Cir. 1972) .. 16, 35, 36

Statutes Cited:

8 U.S.C. § 208 44

8 U.S.C. § 212(a)(19) 14, 21

Page

8 U.S.C. § 212(c) 37, 38, 40, 41

8 U.S.C. § 212(i) 13, 18, 26, 27, 40

8 U.S.C. § 216(c)(4) 44

8 U.S.C. § 241(a)(1) 21

8 U.S.C. § 241(f) 7, 10, 12, 13, 14, 15, 16, 18, 21, 22

8 U.S.C. § 243(h) 44

8 U.S.C. § 244(a) 39, 40, 41, 44

8 U.S.C. § 440(d) 41

8 U.S.C. § 601(d)(5) 13, 19

8 U.S.C. § 1101(f)(6) 43

8 U.S.C. § 1251(a)(1) 21

8 U.S.C. § 1251(a)(1)(H) ..... *passim*

8 U.S.C. § 1427 ..... 42, 43

8 U.S.C. § 1427(d) 43

8 U.S.C. § 1427(e) 43

Displaced Persons Act of 1948, 62 Stat. 1009, § 10 .... 7, 8

Page

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Efficiency of the Immigration and Naturalization Service, Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, 96th Cong., 1st Sess. on H.R. 5087, Oct. 31, 1979 ..... 21, 24

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Gordon, *et al., Immigration Law and Procedure*, § 71.04[2][a] (1996) 18

H.R. Rep. No. 264, 97th Cong., 1st Sess. 24, reprinted in 1981 U.S. Code Cong. & Admin. News 2577 24

H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7(1957) 9

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S. Rep. No. 1057, 85th Cong., 1st Sess. (1957) 9

1981 U.S. Code Cong. Admin. News 2577 2

8 C.F.R. § 212.8(b) (1978) 2

8 C.F.R. § 242.22 41

STATEMENT OF FACTS

A. Introduction

Respondent Yueh-Shaio Yang has resided in the United States for 18 years and is 76 years old. Mr. Yang is before the Court because he misrepresented his wife's identity and place of birth to immigration authorities in order to immigrate to the United States. After immigrating in 1978, Mr. Yang started a business and has otherwise led an exemplary and productive life in the United States. One of his daughters is a United States citizen. In spite of his equities, the Board of Immigration Appeals denied an humanitarian family waiver under § 241(a)(1)(H) of the Immigration and Nationality Act, and petitioner Immigration and Naturalization Service challenges the Circuit Court's decision remanding the case for re-evaluation.

B. Relevant Evidence Adduced at the Deportation Hearing

Mr. Yang is a native of mainland China and a citizen of the Republic of China on Taiwan.[1] Mr. Yang and his wife were married in mainland China, but fled to Taiwan at the conclusion of World War II as mainland China was falling under communist control. While living in Taiwan, Mr. Yang worked in the communications field for Civil Air Transport, a private company run by General Claire Chennault,[2] which worked both with the

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1. Petitioner's brief states that Mr. Yang is a native of the People's Republic of China. Brief for Petitioner, p. 2. The Board of Immigration Appeals stated that Mr. Yang is a native of Taiwan. Pet. App. 6a. The Order to Show Cause merely stated that Mr. Yang was born in China.

2. The transcript uses the phonetic spelling of "Sharnot." TR 102. However, Mr. Yang was referring to General Chennault of Flying Tigers fame. The transcript also shows his position with General Chennault as that of a clerk. TR 102. However "clerk" in Chinese is a more expansive term that covers all staff employees who are not of managerial rank.

government of Taiwan and the United States government. He fled to the United States during the exodus of the late 1970's when the United States broke off diplomatic relations with the Republic of China. TR 122.

Mr. Yang immigrated to the United States through his wife, who originally came to the United States in 1977 as a visitor. While she was here, she met an individual who advised her that she could immigrate to the United States by investing $60,000 if she were unmarried.[3] Mrs. Yang returned to Taiwan to obtain the money and divorce Mr. Yang;[4] she then traveled back to the United States.

After she paid the money, Mrs. Yang appeared at the Immigration and Naturalization Service offices in San Francisco, California for an interview by an INS officer. A week later, she received a United States passport under the assumed name of Mary Wong. Admin Rec. TR 37-38. With this passport identifying her as a U.S. citizen, Mrs. Yang returned to Taiwan and remarried her husband under this new identity. She then filed a visa petition on Mr. Yang's behalf. Pursuant to this petition, he received an immigrant visa and immigrated to the United States on August 1, 1978 as the spouse of Mary Wong, a U.S. citizen.

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3. At that time, persons could immigrate upon the investment of at least $40,000 in a business. 8 C.F.R. § 212.8(b) (1978). However, visas were no longer immediately available in this category by the end of 1977 and were completely exhausted by the end of May 1978; the State Department had advised that due to changes in the law, there would be no further allocation of visas to this category. *See* Pet. App. 15a-16a; 1981 U.S. Code Cong. Admin. News 2577, 2605.

4. The evidence in the record shows that Mr. Yang thought the money was for the purpose of obtaining an otherwise legal immigrant visa based on business investment. He acknowledged, however, that his use of his wife's assumed identity and her marital status was a deception. TR 75.

In 1982, Mr. Yang applied for naturalization. The information provided on his application repeated the information he had provided previously when he immigrated to the United States. Although Mr. Yang was interviewed for his naturalization, his application was never approved.

In 1992, approximately ten years after Mr. Yang applied for naturalization and fourteen years after he immigrated, the INS issued deportation charges against Mr. Yang and his wife. The original deportation charges against Mr. Yang alleged that he entered as an immigrant who was seeking to work but did not have the required labor certification and that he did not possess a valid visa. Joint Appendix 1-6. At a preliminary hearing, Mr. Yang admitted the charges. On the day of the deportation trial, the INS lodged an additional charge that Mr. Yang was deportable as an alien who was excludable at the time of entry on the ground that he had procured entry by misrepresenting a material fact. Admin. Rec. TR 19. Mr. Yang admitted that new charge as well and applied for relief from deportation under the § 241(a)(1)(H) family waiver provision on the ground that he is the father of a United States citizen daughter.

At the deportation hearing, Mr. Yang submitted evidence showing substantial equities warranting a favorable exercise of discretion, including the fact that four of his eight children live in the United States and that his advanced age and health problems, together with the many years he has lived in the United States, would make it difficult for Mr. Yang to return to Taiwan.

The immigration judge found that Mr. Yang was eligible for the waiver. However, the judge denied the application. Mr. Yang appealed to the Board of Immigration Appeals, but the Board agreed with the immigration judge and dismissed the appeal. However, the Ninth Circuit Court of Appeals granted Mr. Yang's petition for review on the ground that both the immigration judge

and the Board had considered impermissible factors in denying the waiver application; the case was remanded for a re-weighing of the equities.

Since his admission in 1978, Mr. Yang has never been arrested, cited, charged, indicted, convicted, fined or imprisoned for breaking or violating any law or ordinance. Joint Appendix 10. Mr. Yang has been a productive resident of this country. He has significant ties to this country. He has owned his own company and invested substantial amounts of money in developing real estate here. Admin. Rec. TR 78, Pet. App. 11a. He has regularly paid his income taxes and contributed to charitable causes. Admin. Rec. TR 85,86.

C. Evidence Relied Upon By The Immigration Judge

Although the immigration judge noted the positive equities in Mr. Yang's case, he also believed that Mr. Yang had not been candid about his financial status early in the hearing. TR 15. The immigration judge further found that Mr. Yang's equities were based "almost solely"[5] on his relationship to children who had immigrated illegally and who had committed acts of "less than sterling nature." *Id.* The immigration judge specifically referred to attempted immigration fraud committed by two of his children, then went on to conclude that Mr. Yang did not warrant a favorable exercise of discretion, due in large part to the acts of his family. TR 15, 16.

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5. The government misquotes this phrase as "also solely." Pet. App. 24a. The "almost" in the immigration judge's decision likely refers to Mr. Yang's daughter, Lilly Liu, who immigrated legally and is now a naturalized U.S. citizen. There is no other reference to Ms. Liu in the immigration judge's decision.

D. Evidence Relied Upon By The Board Of Immigration Appeals

In dismissing Mr. Yang's appeal, the Board identified four adverse factors: (1) his divorce and remarriage before immigrating to the United States; (2) his application for naturalization in which he perpetuated the fraud of his wife's identity as a U.S. citizen; (3) his second divorce and remarriage, "in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity."; and (4) his lack of candor regarding his knowledge of the significance of his fraud.[6] Pet. App. 10a.

E. Evidence Relied Upon By The Ninth Circuit

The Court of Appeals found that Mr. Yang's participation in his wife's fraudulent entry, as well as their divorces and remarriages and the statements made on his naturalization application, were all component parts of the same fraud.[7] As such, they could not be considered by the immigration judge. Pet. App. 2a-3a. However, the Court of Appeals found that Mr. Yang's lack of candor at the hearing regarding his finances was properly considered. The case was remanded for a re-weighing of the equities, with the questionable testimony constituting an adverse factor.

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6. This factor appears to be a misstatement by the Board. The immigration judge found that Mr. Yang lacked candor in his testimony about his finances. TR 15. The credibility finding referred to by the Board actually pertains to Mrs. Yang. See TR 11.

7. Although Mr. Yang's "divorces and remarriages" are referred to in the plural, the second fraud and remarriage was for the purpose of allowing Mr. Yang and his wife to resume their true identity as a married couple. TR 40-41. The immigration judge made no adverse finding regarding the second divorce.

SUMMARY OF ARGUMENT

The history and plain language of the family waiver of § 241(a)(1)(H), as well as prior decisions of this Court, require a finding that the Board of Immigration Appeals' consideration of respondent's actions before and after his fraudulent entry into the United States was improper.

When the predecessor to § 241(a)(1)(H) was enacted in 1948, its humanitarian purpose was to forgive acts of immigration fraud or misrepresentation in the interest of family unity. Nothing in the ensuing years has diminished those aims. Although the provision was amended in 1981, the heart of the waiver continues to offer relief to those who used fraud or misrepresentation in their immigration who are "otherwise admissible." Read in conjunction with cases leading up to the 1981 amendments and the retention of the "otherwise admissible" language, the new version of the waiver actually broadened its scope. The Immigration and Naturalization Service could no longer elude the waiver by lodging separate statutory allegations that actually flowed from the fraudulent act. But most significantly for this case, Congress continued to use the "otherwise admissible" language. This makes clear that Congress intended to leave intact a statutory scheme that forbade the consideration of the fraud that gave rise to deportability in determining whether to grant the waiver. Contrary to the government's assertions, the "initial fraud" concept is required by statute and is not a revocable policy adopted by the Board of Immigration Appeals as a matter of leniency.

The initial fraud concept is thus of statutory creation, making it clear that the original fraud is not to be weighed in the waiver decision. The question then becomes whether actions that are all part of the initial fraudulent scheme can be disaggregated in a manner that they should not be shielded from consideration

by the initial fraud concept. The context of the facts of this case make the answer evident. Any fraud has several components; if the government's approach were allowed, the statute would be rendered meaningless. Thus, the planning, preparation, implementation, and continuation of the fraud must all be deemed part of and protected by the initial fraud concept. This must be especially so when the fraud involves a change in identity or persona.

Thus, the case should be remanded to the agency for a proper weighing of equities and misdeeds. Respondent concedes that if he was not candid about his financial circumstances before the immigration judge, that action can be properly weighed since it had nothing to do with his initial immigration fraud.

ARGUMENT

I.

THE HISTORICAL DEVELOPMENT OF THE § 241(a)(1)(H) FAMILY WAIVER DOES NOT SUPPORT THE GOVERNMENT'S INTERPRETATION OF THE STATUTE; CONGRESS DID NOT GRANT THE ATTORNEY GENERAL BROAD DISCRETION TO DETERMINE WHICH CASES OF INITIAL-FRAUD ENTRY MERIT A WAIVER OF DEPORTATION.

A. The First Appearance Of The Family Waiver And The "Initial Fraud" Construction Of "Otherwise Admissible"

The legislative history of the family waiver of § 241(a)(l)(H), or § 241 (f) as it appeared in the statute until 1990, begins with the enactment of the Displaced Persons Act of 1948, 62 Stat. 1009. This Act provided for the admission to the United States of thousands of war refugees, many from countries that

had fallen behind the Iron Curtain. Some of these refugees misrepresented their nationality or homeland while in Europe to avoid being repatriated to a communist country. In so doing, however, they fell afoul of § 10 of the Act, which provided that persons making willful misrepresentations for the purpose of gaining admission "shall thereafter not be admissible into the United States. "The plight of these refugees, who were excluded from the United States for misrepresentations that were generally felt to be justifiable, inspired recurring proposals for statutory reform. When the Act was revised and codified in 1952, the House Committee recommended adding a provision to save such refugees from deportation when they had misrepresented their nationality or homeland only to avoid repatriation and persecution. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 128 (1952). The Conference Committee deleted the provision, but announced its sympathy with the refugees in the following terms:

> It is also the opinion of the conferees that the sections of the bill which provide for the exclusion of aliens who obtained travel documents by fraud or by willfully misrepresenting a material fact, should not serve to exclude or to deport certain bona fide refugees who in fear of being forcibly repatriated to their former homelands misrepresented their place of birth when applying for a visa and such misrepresentation did not have as its basis the desire to evade the quota provisions of the law or an investigation in the place of their former residence.

H.R. Rep. No. 2096, 82d Cong., 2d Sess. 128 (1952).

The Immigration and Naturalization Service and the Attorney General did not construe the statute as the Conference Committee had recommended, however, believing that the explicit statutory language did not allow for an exemption for justifiable misrepresentations. Refugees who misrepresented their place of origin were always found to have concealed a material fact, since the misrepresentation hindered an investigation of their background. *See Matter of B- and P-*, 2 I. & N. Dec. 638 (1947); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 10 (1957).

The misrepresentation section was not the only provision of the 1952 legislation that was widely thought to be unnecessarily harsh and restrictive, and in 1957 Congress passed legislation alleviating in many respects the stricter provisions of the earlier legislation. The purpose of the 1957 Act is perfectly clear from its terms, as well as from the relevant House and Senate Committee Reports. The most important provisions of the Act provided for special nonquota status for the adopted children or illegitimate children of immigrant parents, and for orphans who have been or are to be adopted by United States citizens. Other important provisions allowed the Attorney General to waive certain grounds for exclusion or deportation, including affliction with tuberculosis or conviction of a crime involving moral turpitude, on behalf of aliens who have close relatives of United States citizens or aliens lawfully admitted for permanent residence. H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7 (1957). *See also*, S. Rep. No. 1057, 85th Cong., 1st Sess. (1957). This Court recognized that the "intent of the Act was plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country." *INS v. Errico*, 385 U.S. 214, 220 (1966).

In this context it is not surprising that Congress also granted relief to aliens facing exclusion or deportation because they had gained entry through misrepresentation. Section 7 of the 1957 Act, which later evolved into § 241(f) then § 241(a)(1)(H), provided, in pertinent part, that:

> The provisions of section 241 . . . relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien *otherwise admissible* at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954 ... and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: Provided, that such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. . . .

(Emphasis added).

This Court was presented with the statutory construction question over the phrase "otherwise admissible" in *INS v. Errico*, 385 U.S. 214 (1966). The Court noted that the section waived deportation for two classes of aliens who entered by fraud or misrepresentation. First, an alien who was the spouse, parent, or a child of a U.S. citizen was saved from deportation for the fraud if he or she was "otherwise admissible at the time of entry." Second, an alien who entered during the postwar period and misrepresented his or her nationality, place of birth, identity, or residence was saved from deportation if he or she was "otherwise admissible at the time of entry" and could establish that the misrepresentation was predicated on fear of persecution and "was not committed for the purpose of evading the quota restrictions." This Court concluded,

> Congress must have felt that aliens who evaded quota restrictions by fraud would be "otherwise admissible at the time of entry" or it would not have found it necessary to provide further that, in the case of an alien not possessing a close familial relationship to a United States citizen or lawful permanent resident, the fraud must not be for the purpose of evading quota restrictions.

Id. at 222-23. Thus, the Court held that it was improper to deny relief to statutorily-eligible aliens who had close U.S. citizen relatives if they had not complied with quota requirements. *Id.* at 223. This marked the recognition by the Court that as long as the alien had a close statutory relative, the relief should be granted. The initial fraudulent action to evade immigration requirements must be set aside in determining whether the person was "otherwise admissible."

B. Expansions Under The 1981 Amendments

In response to controversies that arose over the application of § 241(f) after the *Errico* decision, Congress amended the provision in 1981. In support of its contention that Congress intended to grant the Attorney General broad discretion to determine which cases of fraud merit a waiver of deportation, the government cites language in the 1981 legislative history that asserted that § 241(f) had become a "major source of controversy" and that "litigants ha[d] sought to expand § 241(f) into a charter of amnesty, waiving all restrictions for those who had entered the United States through fraud." (Brief for the Petitioner at 20). In seeming support of this contention, in 1975, this Court observed that decisions of the lower courts under § 241(f) might be "summarized in the language of Macduff: 'Confusion now hath made his masterpiece.' " *Reid v. INS*, 420 U.S. 619, 628 (1975). Thus, in the government's view, the analysis is simple: In response to these concerns, Congress made § 241(f) discretionary. Since the relief is now discretionary, the Attorney General's authority over the waiver should be "unfettered." Aside from the fact that discretionary authority does not confirm unfettered decisionmaking, the problem with the government's analysis is that it ignores the judicial development of § 241 (f), what Congress actually did, and why Congress acted as it did.

In fact, the attempt to expand § 241(f) into a so-called "charter of amnesty" and the "confusion" of the lower courts had to do with claims that the relief should be extended to aliens who had entered on temporary or nonimmigrant visas or under false claims to U.S. citizenship. The type of case involved here — entry as an immigrant based on fraud — was never a source of controversy or confusion. That such immigrant cases were intended to be covered by the waiver was never disputed. In *Reid*, the Court held that an alien who accomplished entry by falsely

asserting U.S. citizenship was not eligible for § 241(f) relief, because such aliens were deportable on grounds distinct from entry based on fraud and misrepresentation (viz., entry without inspection). *Reid v. INS, supra*, at 624. The Court was also critical of lower courts that had extended § 241(f) relief to aliens entering the United States under temporary visitor permits, who acquired one of the specified familial relationships after entry, and who argued that their fraudulent intent upon entry to remain in the country permanently cloaked them with immunity from deportation even though they overstayed their visas. *Id.* at 628.

Therefore, the 1981 amendments codified *Reid* by adding language to Section 241 (f) that limited its application to those who were "in possession of an immigrant visa or equivalent document." That language was retained in 1990 when the provision was renumbered § 241(a)(1)(H). Thus, the waiver is not available to all aliens who have entered through fraud or misrepresentation. The waiver is available only to *immigrants* who have entered through fraud or misrepresentation. At the time, this conformed § 241 (f) with the exclusion waiver of § 212(i), which, until 1990, was specifically limited to the case of an "immigrant" excludable for fraud or misrepresentation who was "otherwise admissible."[8]

The 1981 amendments cleared up another problem identified in the *Reid* decision related to the scope of the waiver. In *Reid*, this Court noted: "[n]or has there been agreement among

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8. The 1990 Act amended INA § 212(i) in three ways. First, it made the waiver available to both nonimmigrant and immigrant visa applicants. Second, the new law expanded the applicable family relationships to include adult sons and daughters of U.S. citizens and residents, not just unmarried children under 21. Third, the changes made the waiver available to any alien, regardless of the existence of a family relationship, if the fraud or misrepresentation occurred at least 10 years before the alien's application for a visa, entry, or adjustment of status. Immigration Act of 1990, § 601(d)(5).

those courts which have construed § 241(f) to waive substantive grounds for deportation under § 212 other than for fraud delineated in § 212(a)(19) as to which other grounds are waived." 420 U.S. at 629. In other words, the fact that an immigrant had committed fraud in entering might give rise to a separate, non-fraud ground of exclusion or deportation, such as lack of a labor certification or valid visa. Thus, some courts refused to extend § 241 (f) relief when the INS alleged excludability for lack of a labor certification or valid visa even though those exclusion grounds flowed from the initial fraud or misrepresentation. *See, e.g., Escobar Ordonez v. INS*, 526 F.2d 969 (5th Cir. 1976); *Matter of Montemayor*, 15 I. & N. Dec. 353 (BIA 1975); *cf. Matter of Anabo*, 18 I. & N. Dec. 87 (BIA 1981). This was in spite of the fact that someone who used fraud to obtain an immigrant visa, obviously possessed an invalid immigrant visa. So the government successfully argued in some courts that a person excludable for fraud was also excludable for possession of an invalid visa, to which § 241(f) did not apply. By successfully arguing that an invalid visa or lack of labor certification charge was distinct, the government could avoid the application of § 241(f). The BIA followed this restrictive logic:

> We recognize that this construction of the statute drastically reduces the scope of section 241(f). . . . It means that there will virtually always be an alternative ground of deportability, not affected by § 241(f), in any case in which deportability can be predicated on § 212(a)(19) [fraud or misrepresentation]. In the case of an alien who entered with an immigrant visa . . . a common alternative charge would be based on § 212(a)(20) [invalid visa]. However, the [Supreme] Court's opinion in *Reid* limits the applicability of § 241(f) to a § 241(a)(1)

> charge of deportability based on . . . 212(a)(19). . . . The respondent [in this case] remains deportable under the charges based on section 212(a)(14) [lack of labor certification] and section 212(a)(20) [invalid visa].

Matter of Montemayor, 15 I. & N. Dec. 353, 356 (BIA 1975).

The 1981 amendments reversed that interpretation of Section 241 (f) and its successor § 241(a)(1)(H), by providing that the waiver is available so long as the alien "was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of § 1182(a) [formerly 212(a)(14) and 212(a)(20)] of this title [relating to possession of valid labor certifications and immigrant visas, respectively] which were a direct result of that fraud or misrepresentation." Thus, the 1981 amendments assured an expansive application of the statute insofar as its applicability to grounds of inadmissibility at entry directly resulting from the initial fraud or misrepresentation. The amendments resurrected the waiver in those jurisdictions that had allowed INS to elude § 241(f) by alleging invalid visa or lack of labor certification. Furthermore, the waiver was extended to innocent as well as to fraudulent misrepresentations.[9]

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9. David Crosland, the Acting Commissioner of INS described the 1981 amendment this way:

> The amendment makes the waiver discretionary with the Attorney General, clarifies the meaning of the term "otherwise admissible", and makes it clear that relief is available to those who have made innocent, as well as fraudulent, misrepresentations.

Immigration and Nationality Efficiency Act of 1979, Hearings on S. 1763 (Cont'd)

The 1981 amendments also expanded § 241(f) by allowing the affected alien to maintain lawful immigrant status. Prior to 1981, § 241(f) merely acted as a bar to deportation, by providing that the "section relating to deportation . . . on the ground [relating to] fraud or misrepresentation shall not apply." Petition for Writ of Certiorari at 28a. The section did not confer lawful immigrant status or citizenship status. *See, e.g., Yik Shuen Eng v. INS*, 464 F.2d 1265 (2d Cir. 1972). A person was essentially in limbo status and did not acquire lawful immigrant status unless some other relief such as registry or suspension of deportation was available. But since 1981, the provision speaks in terms of "waiving" the grounds of exclusion for those entering as immigrants. By waiving exclusion grounds, the person retains immigrant status. *Matter of Sosa-Hernandez*, 20I. & N. Dec. 758 (BIA 1993).

Thus, the 1981 amendments served to expand the waiver. Charles Gordon, the former INS General Counsel and co-counsel for the government in the *Errico* case explained:

> As General Counsel of the Immigration and Naturalization Service I was involved in much of [the controversy and] litigation [over Section 241 (f)]. It seems to me that to some extent the problem has been caused by the excessive severity of this ground of exclusion and deportation, which continues perpetually. Courts often were impelled to adopt generous interpretations of the statute, in order to promote family unity. . . .
>
> The proposed amendments include the

(Cont'd)

Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 36 (1979) (Statement of David Crosland, Acting Commissioner, INS).

> following elements: . . . The requirement that the beneficiary of the waiver be "otherwise admissible" is defined to eliminate the inadmissibility for visa defects and absence of a labor certification. This reasonable modification will end some of the current controversy. . . . Specific provision is made to benefit those inadmissible for innocent misrepresentations. This is certainly desirable, since it seems unjustifiable to give one guilty of intentional deception greater benefits than one whose misstatement was innocent. Indeed, an early judicial holding, thereafter adopted by the Board of Immigration Appeals, found that section 241 (f) waivers benefitted those who entered irregularly on the basis of innocent misstatements. *See In re Hon*, 289 F. Supp. 204 (S.D.N.Y. 1968); *Matter of Lim*, 13 I. & N. Dec. 169 (BIA 1969). However, this view apparently was rejected by dicta in *Reid v. INS*, 420 U.S. 619, 629-30 (1975), and now has been repudiated by a recent decision of the Board of Immigration Appeals, *Matter of Raqueno*, 17 I. & N. Dec. 10 (BIA 1979). I support the more reasonable approach mandated by the proposed amendment.

Immigration and Nationality Efficiency Act of 1979, Hearings on S. 1763 Before the Senate Committee on the Judiciary , 96th Cong., 1st Sess. 36 (1979), at 54-55 (Statement of Charles Gordon, former General Counsel, INS).

C. Further Expansion By The 1990 Amendments

When the Immigration and Nationality Act was revised in 1990 (Pub. L. No. 101-649, 104 Stat. 4978), § 241(f) was essentially renumbered as Section 241(a)(1)(H). While the revised version looks quite similar to the 1981 version of § 241(f), Congress further expanded the provision in two important respects. The pre- and post-1981 versions of § 241(f) refer to an alien who "is the spouse, parent, or *child* of a citizen" or lawful resident alien. But in today's version since 1990, the § 241(a)(1)(H) family waiver refers to an alien who "is the spouse, parent, *son, or daughter* of a citizen" or resident alien. The change from "child" to "son or daughter" represents an expansion, because under § 101(b)(1) a child is defined as a person who is unmarried and under the age of 21. A "son or daughter" on the other hand can be married and over the age of 21. The revised version extended coverage to aliens who are the adult sons and daughters of U.S. citizens and residents, not just unmarried children under 21. Thus, the waiver had a broader familial application after 1990.

The 1990 changes also expanded the range of misrepresentations resulting in excludability to coincide with the revised grounds for excludability for misrepresentation that were a part of the Immigration Marriage Fraud Amendments of 1986. *See* Gordon, *et al.*, *Immigration Law and Procedure*, § 71.04[2][a] (1996).

The parallel § 212(i) family exclusion waiver was also broadened by the 1990 amendments.[10]

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10. Under the prior version of INA § 212(i), aliens could have their excludability for fraud or misrepresentation waived only if they were (1) otherwise admissible as permanent residents, and (2) the spouse, parent or child of a U.S. citizen or permanent resident. The 1990 Act amended INA § 212(i) in three ways. First, it made the waiver available to both nonimmigrant (Cont'd)

II.

THE INITIAL FRAUD CONCEPT IS REQUIRED BY STATUTE; ITS APPLICATION IS NOT A REVOCABLE POLICY ADOPTED BY THE BIA AS A MATTER OF LENIENCY.

A major premise of the government's position in this case is defective. The government argues that:

> Under the qualified language of Section 241(a)(1)(H) and its predecessor, the Attorney General would be fully justified in considering (along with other positive and negative factors) the nature and gravity of the initial fraud or misrepresentation at the time of entry, which renders the alien deportable in the first place and is the subject of the waiver. . . . But the BIA has to date adopted a more lenient policy. The BIA has concluded that the fraud or misrepresentation at the time of the alien's entry will not be included in the otherwise comprehensive balancing of factors it deems relevant to the waiver determination.

Br. for Pet. at 24 (emphasis added). Put differently, "it is for the

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and immigrant visa applicants. Second, as with INA § 241(a)(1)(H), the new law expanded the applicable family relationships to include adult sons and daughters of U.S. citizens and residents, not just unmarried children under 21. Third, the changes made the waiver available to any alien, regardless of the existence of a family relationship, if the fraud or misrepresentation occurred at least 10 years before the alien's application for a visa, entry, or adjustment of status. Immigration Act of 1990, § 601(d)(5).

Attorney General, not the courts, to determine which aspects of the alien's character and conduct will be considered, and which will not, in deciding whether to grant a discretionary waiver of deportation." Br. for Pet. at 33. The implication is that the Attorney General directly, or through the BIA, could revoke the "lenient policy" of the initial-fraud concept. But this characterization of the initial-fraud concept is inaccurate. Congress has not left it to the Attorney General to determine whether the initial fraud should be considered. The statute requires that the initial fraud not be considered. This case involves the Attorney General's interpretation of § 241(a)(1)(H), so review must begin with the Attorney General's construction of the statute. But whatever authority the Attorney General and her delegates have to grant a waiver, they must act within the bounds of the authority delegated to them by Congress. The bounds of that authority are defined by the statute and the judiciary, not the Attorney General; the courts are the final authority on issues of statutory construction. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9, 104 S. Ct. 2778 (1984).

A. In *INS v. Errico*, This Court Already Determined That The Initial Fraud Concept Is Required By The Statute

This Court has already recognized in *INS v. Errico*, 385 U.S. 214 (1966), that the initial fraud concept is not a matter of grace or discretion on the part of the Attorney General. The initial-fraud concept is required by statute. In concluding that it was improper to deny relief to statutorily-eligible aliens who had close U.S. citizen relatives if they had not complied with quota requirements, the Court assumed that initial fraud triggers the waiver provision and that the fraud not be placed on any balancing scale after that. *Errico, supra*, at 223. The fact that the term "discretion" was added in 1981 does not change this result.

B. The Introduction Of Discretion To § 241(f) In 1981 Was Directed At The Broadened Subject Matter Of The Waiver

The family waiver was amended by Pub. L. No. 97-116, effective December 29, 1981, which modified the previously mandatory waiver of deportability for violation of INA § 241 (a)(1) [8 U.S.C. §§ 1251(a)(1)] (excludable at entry) and § 212(a)(19) [1182(a)(19)] (visa fraud or misrepresentation) and expanded its scope. The amendment gave the Board of Immigration Appeals discretionary authority over the broadened subject matter.[11] The purpose of the amendment was two-fold: one, to expand the classes of people for whom the waiver of deportability was available; and two, to enable the Board to settle troublesome legal questions regarding eligibility in an equitable manner. The amendment made relief available both for innocent and fraudulent misrepresentations and for aliens charged with excludability based on lack of a labor certification or valid immigrant visa. While the former may arguably be said to be

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11. The testimony of Richard Fairbanks, the Assistant Secretary of State for Congressional Relations, supports respondent's interpretation:

> The [1981] amendment replaces the mandatory waiver with a discretionary waiver by the Attorney General of the grounds of inadmissibility specified in section 212(a)(14), (20), and (21) [lack of labor certification and invalid visa] in the case of such an alien not subject to deportation under section 212(a)(19) [fraudulent misrepresentation] and who possesses an immigrant visa or equivalent document at the time of entry and who is otherwise admissible, except for such grounds.

Efficiency of the Immigration and Naturalization Service, Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, 96th Cong., 1st Sess, on H.R. 5087, Oct. 31, 1979, at 42-43 (Testimony of Richard Fairbanks).

merely a clarification, the latter is clearly an expansion, especially in light of how certain court interpretations had eviscerated the relief when lack of a labor certification or an immigrant visa were also alleged.

Prior to the 1981 amendment, Mr. Yang clearly had an absolute right to remain in this country, unless he lived in a jurisdiction that allowed INS to get around § 241 (f) by alleging lack of a labor certification or valid immigrant visa as a result of the fraud. The intent of Congress in amending the section and using the word "discretion" was not to enable the Board to deport an individual, like Mr. Yang, who clearly qualified for relief. Rather, the purpose of the amendment was to breathe life back into § 241 (f) family waiver by overruling the judicial opinions that had allowed INS to elude the relief by alleging lack of labor certification or invalid visa and to alter agency authority at the margins by permitting the BIA to exercise its discretion in cases in which the courts previously were required to make fine distinctions. The House Report to the 1981 amendments, states:

> The scope of the waiver and the meaning of "otherwise admissible" have become increasingly unclear. [The Amendment] clarifies that the waiver is only intended to apply to immigrants and that it is available for innocent (as well as fraudulent) misrepresentations. By doing this and making the waiver discretionary, it should obviate the need for further litigation, and promote the uniform administration of this section. H. Rep. No. 264, 97th Cong. & Ad. News 2577.

Here, however, the Board used its discretion to cut back on rights clearly afforded to Mr. Yang by the unamended statute, a result

certainly not contemplated by Congress. After all, how could "the need for litigation" be obviated or "the uniform administration" of the waiver be promoted if a class of cases that was previously indisputably within the waiver would now be subject to unfettered discretion? The government's reading would actually foster more litigation and lack of uniformity. The Yang scenario was not part of the problem prior to 1981. Fraud in obtaining immigrant status was always squarely within the parameters of the waiver.

C. The Initial-Fraud Concept Stems From The Plain Language Of The Statute

In all cases involving statutory construction, the starting point must be the language employed by Congress. *INS v. Hector*, 479 U.S. 85, 88 (1986); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). It is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

Respondent's interpretation of the provision that the initial-fraud concept is required by the law is unavoidable from its plain language. Section 241(a)(1)(H) provides that deportation related to entry on the basis of fraud or misrepresentation, "whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien . . . who . . . is the spouse, parent, son, or daughter of a citizen . . . or permanent residen[t], and . . . was in possession of an immigrant visa or equivalent document and was otherwise admissible." The "otherwise admissible" language requires the putting aside of the initial fraud or misrepresentation before discretion is exercised, otherwise the provision would make no sense. In essence, the language means "other than the fraud or misrepresentation the person was admissible." There would be

no reason to include the "otherwise admissible" language if the initial fraud were to be part of the weighing process as the government urges. Because the statute specifically forgives the misrepresentation, the mere fact that such a misrepresentation was made cannot be weighed as a factor against granting the waiver. Nothing in the legislative history of the 1981 amendments supports the contention that Congress intended to limit the availability of the waiver. *See* H.R. Rep. No. 264, 97th Cong., 1st Sess. at 24-25, reprinted in 1981 U.S. Code Cong. & Admin. News 2577, 2593-94.[12]

Even the description of the waiver in the government's brief suggests that the initial-fraud concept is required by the statute. The government states:

> [F]raud or misrepresentation may be waived . . . if (1) the alien is the spouse, parent, or child of a citizen or lawful resident alien; (2) the alien was in possession of an immigrant visa or equivalent document (regardless of its validity . . .) . . . and (3) the alien, at the time of entry, was eligible (*aside from the fraud or misrepresentation*) for admission to the United States.

Br. for Pet. at 16 (emphasis added). In other words, one should put "aside . . . the fraud or misrepresentation" in determining whether the fraud should be waived. Similar, in the government's petition for writ of certiorari, it described the operation of the waiver in this manner:

> An alien who procured his initial entry into the United States "by fraud or [by] willfully misrepresenting a material fact," . . . is normally subject to deportation once the deception is discovered. . . . If the alien is the spouse, parent, [son or daughter] of a citizen or lawful resident alien, however, and if, at the time of entry, he would have been eligible for admission to the United States *but for* the fraud or misrepresentation, then deportation may be waived, "in the discretion of the Attorney General." 8 U.S.C. 1251(a)(1)(H).

Pet. at 10 (emphasis added). The government's use of the phrase "but for the fraud or misrepresentation" after "would have been eligible for admission" in paraphrasing § 241(a)(1)(H) is an absolutely clear acknowledgment that the fraud or misrepresentation must be put to the side in determining whether or not the person was "otherwise admissible."

In fact, the government's position in this case that the initial-

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12. The testimony of Richard Fairbanks, the Assistant Secretary of State for Congressional Relations, supports respondent's interpretation:

> The [1981] amendment replaces the mandatory waiver with a discretionary waiver by the Attorney General of the grounds of inadmissibility specified in section 212(a)(14), (20), and (21) [lack of labor certification and invalid visa] in the case of such an alien not subject to deportation under section 212(a)(19) [fraudulent misrepresentation] and who possesses an immigrant visa or equivalent document at the time of entry and *who is otherwise admissible, except for such grounds.*

Efficiency of the Immigration and Naturalization Service, Hearing Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, House of Representatives, 96th Cong., 1st Sess, on H.R. 5087, Oct. 31, 1979, at 42-43 (Testimony of Richard Fairbanks) (emphasis added).

fraud concept is a revocable act of leniency on the part of the BIA is of recent vintage. In the past, the government has conceded the respondent's view on the initial-fraud concept. For example, while controversy existed over the scope of what was within initial fraud, the Fifth Circuit noted in a separate case that the waiver "presupposes that the petitioner has committed an act justifying deportation. In its brief, the INS concedes that the original fraudulent act should not be considered as an adverse factor in the balancing equation." *Liwanag v. INS*, 872 F.2d 685, 687 (5th Cir. 1989).

While respondent obviously disagrees with the ultimate decision of the immigration court below, even the immigration judge understood the initial-fraud concept as one that is imposed by statute, the breadth of which is a matter of statutory construction. Pet. App. at 14a-15a.

To support its argument that the initial-fraud rule is not required by statute, the government also relies on two administrative decisions relating to a separate, but analogous, exclusion waiver: § 212(i). Br. for Pet. at 25. But nothing in either decision supports the government's interpretation. *Matter of Alonzo*, 17 I. & N. Dec. 292 (Comm'r 1979), and *Matter of Da Silva*, 17 I. & N. Dec. 288 (Comm'r 1979), were both decided by the Commissioner of the Immigration and Naturalization Service. Faced with "otherwise admissible" language in § 212(i), in *Alonzo*, the Commissioner concluded: "Obtaining visas by fraud and misrepresentation shows disrespect for the law, but this is the action for which they seek to be forgiven and should not be held as an adverse factor." *Alonzo* at 294. Similarly, in *Da Silva*, the Commissioner assumed that the initial fraud should not be considered: "While the initial fraud is obviously adverse, this is the action for which he asks to be forgiven." *Da Silva* at 290. Nothing in either *Alonzo* or *Da Silva* indicates that the initial-fraud concept was being

established by the Commissioner as a matter of revocable leniency. Rather, the decisions demonstrate a rather proper interpretation of the § 212(i) family exclusion waiver that initial fraud cannot be considered due to the wording of the provision.

In short, the government ignores the plain language of the statute and misconstrues the structure of the Immigration and Nationality Act, much as it did in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In Cardoza-Fonseca, the BIA somehow attempted to equate the standard of proof for asylum ("well-founded fear of persecution") with that of withholding of deportation ("clear probability") found in two entirely different parts of the Act and enacted under two entirely different circumstances. *Id.* at 430. The Court rejected that interpretation, because the Attorney General "ignore[d] the structure of the Act" and "misconstrue[d] the federal courts' role in reviewing an agency's statutory construction." *Id.* at 443.

D. Given The Stakes, Any Doubt As To The Proper Construction Of The Statute Should Be Resolved In The Alien's Favor.

Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:

> We resolve the doubts in favor of [the alien] because deportation is a drastic measure and at times are equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388 [(1947)]. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the

> alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 [(1948)].

The Court has already recognized that the law that first implemented this family waiver "was not a punitive statute, and . . . 241(f) in particular was designed to accomplish a humanitarian result. We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breakup up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens." *Errico* at 224-25. Even the dissent in *Errico* is consistent with respondent's position. Justice Stewart argued that the aliens in *Errico* were ordered deported, not because of their fraud, but because they were not properly within their countries' quotas. He went on to note, however, that: "*Fraud is removed as a ground for deportation of those with the requisite family ties*, and 'otherwise admissible' insures the integrity of the statutory scheme." *Errico* at 229 (Stewart Dissent) (emphasis added).

III.

THE BOARD OF IMMIGRATION APPEAL'S INTERPRETATION OF INITIAL FRAUD IS INAPPROPRIATELY NARROW.

In its refusal to grant respondent a family waiver under INA § 241(a)(1)(H), the Board of Immigration Appeals relied heavily on what it identified as "the serious nature of respondent's continuing course of immigration violations, both before and

after his entry in 1978." Pet. App. at 11a. In describing the respondent's "pattern of violating this country's immigration laws through fraud," the Board cited four items in chronological order:

> (1) Respondent's initial "participation in his wife's scheme to enter the United States under an assumed identity by going through a sham divorce and remarriage."
>
> (2) Respondent's entry as "the purported beneficiary of a United States citizen."
>
> (3) Respondent's application "for naturalization in 1982 and [perpetuation of] the fraud of his wife's identity as a United States citizen."
>
> (4) Respondent's participation in "another sham divorce in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity."

Pet. App. at 10a (BIA's Decision).

A. The BIA's Consideration Of Respondent's Entry As "The Purported Beneficiary Of A United States Citizen" And His Participation In "Another Sham Divorce To Attempt To Rectify His Wife's Initial Fraud" Was Reversible Error.

The Board of Immigration Appeals' reliance on the second and fourth factors set forth above constituted reversible error. Consider the second factor. In its weighing of respondent's purported "continuing course of immigration violations" and "pattern of violating . . . immigration laws through fraud," the

Board included respondent's fraudulent entry as the spouse of a United States citizen. Assuming the correctness of respondent's position that the initial-fraud concept is required by statute, then the inclusion of respondent's actual fraudulent entry was a serious error by the Board. After all, his actual fraudulent entry is at the core of his so-called initial fraud. Even assuming the correctness of the government's position that the initial fraud concept is a revocable Board policy, the Board violated its own policy without fair notice or explanation when it placed the core of the initial fraud on the scale.

The Board's consideration of the fourth factor was also a serious error. The Board identified as part of his "pattern of violating" immigration laws respondent's participation in "another sham divorce in order to attempt to rectify his wife's initial fraud and allow her to resume her true identity." Pet. App. at 10a. The Board's discussion of this factor in unfavorable terms is at least puzzling if not an inappropriate mischaracterization of the act as somehow evil. Consider the context of this act in the Board's own words:

> In 1984, the respondent's wife read a newspaper article on the subject of immigration fraud, which prompted her to attempt to undo her claim of citizenship based on a birth certificate other than her own. . . . She therefore had her daughter, who had obtained United States citizenship, file a petition in her behalf under her true identity. . . . In 1985, she and the respondent again divorced. . . . The divorce decree refers to the respondent's wife by the name she acquired in 1978. Then, in 1992, they were remarried. In the 1992 marriage, the respondent's wife used her real name.

Pet. App. at 7a-8a.

The divorce of which the Board is critical in its fourth factor came in the middle of his wife's voluntarily coming forward to properly immigrate through her citizen daughter. Characterizing respondent's second divorce in pejorative terms as a "sham divorce" is patently unfair. Respondent's wife recognized her misdeeds. She was not acting in response to being detected by immigration authorities. She was attempting to rectify things voluntarily. Transcript of Deportation Hearing at 67, 81. As part of those good faith attempts, the respondent and his wife realized that their remarriage in 1978 was not appropriate so they had the marriage invalidated. They were not being surreptitious; this was a matter of public record. The new immigration applications for respondent's wife were also a matter of public record. Her old records would be matched up with her new records because she had been fingerprinted as part of both processes. Thus the divorce of which the Board was critical was part of their good faith attempt to set matters straight, so that they could immigrate legally by using their true identities. They no longer wanted to rely on their assumed personas. The Board's categorizing this act as a factor to be weighed negatively clearly merits more discussion. Indeed, the act was arguably one of good faith that should have been considered a positive factor.

B. Under The Initial-Fraud Concept, The Ingredients Of The Scheme Should Be Considered Part Of The Fraud That Triggers § 241(a)(1)(H) Relief.

The Board dismissed respondent's administrative appeal "[b]ecause we find that the serious nature of respondent's continuing course of immigration violations, both *before and after his entry in 1978*, outweighs the factors in his favor." Pet. App. at 11a. As noted above in the Board's chronology of respondent's "pattern" of fraud, the "before" part of his fraud was respondent's "participation in his wife's scheme to enter the United States under an assumed identity by going through a sham

divorce and remarriage." The problem with identifying respondent's participation in the "sham divorce and remarriage" as a separate and discrete fraud is that he could not have entered fraudulently in 1978 had it not been for the preliminary divorce and remarriage. Obviously this was all part of the respondent's fraudulent scheme to enter the United States. In the words of the court below: "These activities were clearly inextricably intertwined with Mr. Yang's own efforts to secure entry into the country and must be considered part of the initial fraud. " Pet. App. at 2a.

Respondent's scheme to enter the United States involved separate steps. The Board artificially divided his scheme into at least two steps: (a) the preliminary divorce and remarriage, and (b) the act of entering with a fraudulent visa. The Board could have just as easily divided the scheme even further: planning, preparing divorce documents, assisting his wife's return to the United States, preparing new marriage documents, completing his visa application, attending a visa interview, and using the fraudulent visa. The difficulty with the Board's analysis is that all of those steps are part of one scheme, and any fraudulent scheme can be broken down into different parts.

In the Board's view, the "after" part of the respondent's "pattern" was "perpetuation of his wife's identity as a United States citizen" in his application for naturalization. There are two reasons why respondent's naturalization application should not be weighed. The first is that, as in the case of the preliminary divorce and remarriage, it was part of respondent's overall fraudulent scheme to immigrate and become a U.S. citizen. This was another step in his overall scheme that was artificially identified separately by the Board. The naturalization application was filed in 1982; more than 10 years had elapsed when this was considered by the immigration court. The second reason is that maintaining his wife's false identity in the

naturalization application was simply part of the continuation of the respondent's new identity that was assumed as part of his immigration process. We elaborate on this point below.

The government attempts to distinguish respondent's act of seeking naturalization on more serious grounds. The government argues that not weighing the naturalization application "would lead to the forgiveness of a fraud that is more significant than the initial-fraud at which § 241(a)(1)(H) is directed. " Br. for Pet. at 35-36. The government implies that classifying the naturalization application within the "initial-fraud concept" would somehow allow the respondent to be irrevocably granted naturalization. Of course this implication is false and misleading. First of all, the respondent has not been granted naturalization. *See* Part V, *infra.* And second, if he had obtained naturalization fraudulently, respondent's naturalization could have been revoked. The government concedes this point: "Fraud in an application for naturalization as a United States citizen normally is sufficient basis for revocation of citizenship, *see* 8 U.S.C. 1451; *Kungys v. United States,* 485 U.S. 759 (1988)." Br. for Pet. at 36. Respondent's application for naturalization was part of his overall fraudulent scheme. If he had attained naturalization, his citizenship could be revoked. He is not seeking "forgiveness" for his naturalization application in the sense that the government suggests. He did not become a citizen. He is not seeking protection from citizenship revocation.

C. When The Initial Fraud Involves A Change In Identity, Subsequent Acts That Involve The Change In Identity Should Not Be Regarded As Independent Acts Of Fraud.

The Board's weighing of respondent's application "for naturalization in 1982 and [perpetuation of] the fraud of his wife's identity as a United States citizen" as a separate,

independent act would render the § 241(a)(1)(H) family waiver meaningless for someone who gained entry through a fraud that involved a new identity.

When respondent engaged in his fraudulent scheme to immigrate and become a citizen of the United States, he may not have changed his name, but he assumed a persona that clearly contained central fictional aspects: the claims that he was no longer married to his first wife and that he was married to a woman whose name he knew was an assumed identity for immigration purposes. He assumed the identity of a man who was married to this fictitious woman. In order to maintain this identity, any future contact with immigration authorities would have to be conducted with all the trappings of this new persona. Thus, in attempting to complete his fraudulent scheme by applying for naturalization in 1982, the respondent completed the application with the biographic information attached to his new identity. He repeated the exact same false information about his wife that he used in his 1978 immigrant visa application and did not fabricate anything new. To label this a new and separate act of fraud is to ignore the realities faced by individuals who immigrate based on the creation of a false identity. To label this a new and separate act of fraud that can be weighed unfavorably amounts to double counting the fraud: the first is the use of the fraudulent scheme to initiate deportation proceedings, and the second is to use parts of the scheme in violation of the initial-fraud concept attached to the § 241(a)(1)(H) waiver. Respondent's efforts to maintain his and his wife's fraudulent identities once they arrived are an extension of their initial illegality: once they began the charade of their assumed lives, they had to continue using those identities.

The scheme and assumed persona lasted less than six years. Respondent immigrated in 1978 and filed the naturalization application in 1982. But by 1984, after respondent's wife began

clearing up the fraud, the couple sought to terminate the fraudulent marriage and the scheme stopped. Respondent no longer used the false information for further immigration benefits. He did not remarry his wife until 1992 when they were advised to do so by immigration counsel (Transcript of Deportation Hearing at 127), more than 7 years after the second divorce.

Accepting the government's interpretation of the statute would eviscerate the § 241(a)(1)(H) family waiver in cases involving fraudulent immigration based on a change in identity or persona. To allow the government to artificially separate subsequent actions that are taken in the course of the new identity is contrary to the statute. This is evident in our case where the government attacks the act of applying for naturalization, when everything in the application is consistent with respondent's initial fraudulent visa and new identity in his desire to maintain his new identity. The over-zealousness of the government's position is also demonstrated in its criticism of *Delmundo v. INS*, 43 F.3d 436 (9th Cir. 1994), where the immigrant subsequently obtained a driver's license, social security card, and voter's identification card. Br. for Pet. at 32. Of course Delmundo used his new identity to obtain those documents. How else could he obtain them given his situation? Those actions were clearly an extension of Delmundo's new identity, as was the respondent's naturalization application in our case.

Respondent's and Delmundo's changes in identity as part of their fraudulent immigration to the United States are not unusual. In an earlier era of Chinese exclusion laws, many Chinese entered the United States with false documents, false claims, and of course false identities. For the Chinese involved, all aspects of their lives were affected. Indeed, these identity changes impacted subsequent generations. *See, e.g., Jen Hung Ng v. INS*, 804 F.2d 534 (9th Cir. 1986); *Yik Shuen Eng v. INS*, 464

F.2d 1265 (2d Cir. 1972); *United States ex rel. Pon v. Esperdy*, 296 F. Supp. 726 (S.D.N.Y. 1969). The lesson from these cases is that once a new identity is assumed, we should not be surprised by actions taken in accordance with the new identities. Those actions merely perpetuate the scheme of fraud for which the person is now seeking a § 241(a)(1)(H) family waiver.

D. Arguments That Specific Interpretations Would Give Rise To Anomalous Results Are Not Germane.

The government argues that the lower court's interpretation of the initial-fraud concept would give rise to anomalous results:

> The court's approach places an alien who obtains his initial entry by fraud and then commits a series of further fraudulent acts to preserve his illegally obtained status, in a better position than an alien who enters the country by lawful means, but later embarks on a similar series of fraudulent acts in an attempt to remain here. The alien who entered by fraud would, under the Ninth Circuit rule, have all of his frauds ignored in evaluating his request for a waiver of deportation under Section 241 (a)(1)(H). The alien who entered lawfully, however, would have each of the frauds in the series weighed against him if he seeks discretionary relief, such as that available under Section 212(c) . . . .

Br. for Pet. at 34.

As respondent notes below, the family waiver that is the subject of this case under § 241(a)(1)(H) is far different from

other waivers such as the exclusion waiver under § 212(c). For one thing, any survey of § 212(c) cases would reveal that most of those cases involve lawful residents who have committed moral turpitude crimes or narcotics offenses subsequent to immigration. Section 241(a)(1)(H) cases, on the other hand, involve misrepresentation at initial immigration for someone who is closely related to a citizen or lawful permanent resident. Section 212(c) does not require a relative, as does § 241(a)(1)(H). Nor does § 212(c) contain the all important "otherwise admissible" language. Thus, even the government's characterization that the Ninth Circuit has placed the § 241(a)(1)(H) client in a "better position" than the § 212(c) applicant is clearly defensible in typical respective cases.

Assuming that one agrees with the government's implication that the lower court's construction results in anomalous situations (which respondent does not concede), that certainly cannot be the test of whether the lower court's construction is correct. The lower court's reading happens to be the way the statute is formulated. The implied goal in the government's complaint of making absolute, consistent sense of the Immigration and Nationality Act runs a serious risk of frustration given the Act's labyrinthian and, in some opinions, byzantine nature.

Fraudulent immigration into the United States entailing a change in identity is of course serious business that should not be taken lightly. However in the interest of family unity, Congress has enacted legislation that gives a new chance to aliens immigrating through fraud who have citizen or resident alien relatives in the United States. That interest in family unity is built into the statute in a manner that overrides the fraudulent scheme of immigration. Only separate, unfavorable factors that have nothing to do with the fraudulent scheme of immigration can override the family unity interest.

Some may be troubled by this result, but certainly not the citizen relative or the immigrant. The solution for those troubled by the result lies beyond the parameters of the statute. But at least in the instant case, the inquiry has not ended (even in the view of the court below) since the separate, unfavorable factor of respondent's lack of candor before the immigration court has yet to be weighed fairly.

IV.

THE GOVERNMENT'S ANALOGIES TO OTHER WAIVERS AND DISCRETIONARY RELIEF ARE MISPLACED.

The case before the Court is one involving the selection of criteria that can properly be weighed in the exercise of discretion. The respondent's position is that the initial or original fraud, along with actions inextricably intertwined with the fraudulent entry or taken pursuant to an identity change, are not to be weighed in the exercise of discretion. So the case is one involving the selection of criteria as opposed to how to apply and weigh the proper criteria. Respondent's position flows from his construction of the statute and particularly the "otherwise admissible" language of § 241(a)(1)(H).

Thus, this case is not an abuse of discretion case in the sense that respondent is saying that the Court ought to substitute its judgment for that of the agency after a *de novo* weighing of the relevant criteria. Nor is it an abuse of discretion case in the sense that respondent feels that insufficient weight was given particular positive items. Instead, respondent's position is that the Board violated the statute, *i.e.*, abused its discretion, by placing something on the scale that the statute forbids. So the case is very much one of statutory construction.

The government contends that in developing its approach to § 241(a)(1)(H), the Board has "drawn on principles developed under other discretionary waiver[s]" and that this approach is well within its broad discretion. Br. for Pet. at 23, 27. Illustrative of this position is the government's reliance on cases involving a waiver under § 212(c) and suspension of deportation pursuant to § 244(a). These analogies are misplaced because the purpose, history, and language of § 241(a)(1)(H) are so different.

The government cites *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978), a § 212(c), case for its prime example of the Board's practice of "balancing of the alien's undesirability as a permanent resident [against] the social and human considerations present to determine whether according him such relief is in the best interest of this country." Br. for Pet. at 23. Prior to the recent enactment of the anti-terrorism legislation, § 212(c) provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the *discretion* of the Attorney General without regard to [exclusion provisions with certain exceptions. This] subsection shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years.

Then arguing that the Board is deserving of "substantial deference" in interpreting and administering the immigration laws, the government cites as "similar circumstances" the

interpretation of suspension of deportation provisions in Section 244(a). Br. for Pet. at 27. Under § 244(a),

> [The] Attorney General may, in [her] *discretion* suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien . . . [who] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

The principal problem with the government's attempt to liken § 241(a)(1)(H) with §§ 212(c) and 244(a) is that the latter two do not contain the "otherwise admissible" language. The latter two do not instruct the decisionmaker to discount the initial fraud or initial bad act. Instead, §§ 212(c) and 244(a) use the term "discretion" (and in fact "good moral character" is used in suspension), thus inviting everything relevant to be placed on the scale. Thus, in a § 212(c) case, the circumstances that render the alien excludable are relevant because there is no "otherwise admissible" language as there is in § 241(a)(1)(H) or the more analogous § 212(i). Similarly, for suspension under § 244(a) the circumstances that have led to the person's deportability, such as illegal entry, may also be weighed.

A recent change to § 212(c) is also illuminating. The

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was signed into law on April 24, 1996. Section 440(d) of AEDPA eliminates § 212(c) for any alien who is "deportable by reason of having committed any criminal offense covered in" provisions such as those relating to aggravated felonies, controlled substances, and firearms. This is strong indication that when it comes to lawful immigrants who have committed certain deportable crimes, Congress is unforgiving even though many of those immigrants have citizen and lawful resident alien relatives (equities that the Board had previously given great weight to in *Matter of Marin, supra*). In spite of the opportunity in AEDPA and recent legislation aimed at curbing illegal immigration (which contains many provisions that relate to deportation provisions that affect legal immigrants), Congress has not attempted to limit the availability of the § 241(a)(1)(H) family waiver. In fact, the most recent change to the provision in 1990 was expansive. In the case of immigrants who enter through fraud, family unity remains an overriding policy for those immigrants who have close citizen or lawful resident alien relatives in the United States.

The government's reliance on *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam) is particularly misplaced. Brief for the Petitioner at 27-28. Besides the fact that the case involved suspension of deportation under § 244(a) rather than a waiver under § 241(a)(1)(H), the case concerned a motion to reopen rather than review of a denial of substantive relief. Aliens moving to reopen proceedings are in the most powerless posture in deportation proceedings. Motions to reopen are not authorized by statute, but rather are provided for in regulations promulgated by the Attorney General. *See* 8 C.F.R. § 242.22. They involve aliens who have already had deportation hearings. After the hearing but before departure is enforced or while an appeal is pending, the person feels that he or she can now meet the statutory requirements for a relief that was not available at the

earlier hearing. These aliens have to make a motion to reopen deportation proceedings. But this Court has made clear that when the alien is in that posture or position, the courts must pay the greatest deference to the agency. *See, e.g., INS v. Rios-Pineda,* 471 U.S. 444 (1985). The alien has a tremendous burden to overcome in that posture.

The respondent in this case and others seeking statutory § 241(a)(1)(H) family waivers in the first instance should not be analogized to aliens who have already had a bite at the apple who are seeking super-discretionary action to grant them a second or third hearing.

V.

AFFIRMING THE NINTH CIRCUIT'S DECISION WILL HAVE NO EFFECT ON THE REGULATION OF NATURALIZATION CASES.

In footnote 17 of Petitioner's Brief, petitioner argues that affirming the lower court's decision in this case will intrude upon the agency's handling of naturalization matters by preventing the Attorney General from considering the alien's misrepresentations as evidence of bad moral character, thereby frustrating Congress' intent of requiring "good moral character" as a prerequisite to naturalization. Br. for Pet. at 36, 37 n. 17. Petitioner is wrong. Obtaining a waiver of deportation under § 241 (a)(1)(H) does not compel a finding of good moral character under 8 U.S.C. § 1427. The requirements for a waiver under § 241(a)(1)(H) and naturalization are unrelated.

Even though the Attorney General lacks discretion to consider pre- or post-entry concealment in adjudicating a waiver application under § 241(a)(1)(H), this does not compel the conclusion that she would not be able to consider these same acts

in the context of a naturalization application. The section cited by the government, 8 U.S.C. § 1427, states quite specifically that, "[no] finding by the Attorney General that the applicant is not deportable shall be accepted as conclusive evidence of good moral character." 8 U.S.C. § 1427(d). Moreover, the Attorney General can consider the applicant's conduct, *in its entirety,* both before and after being admitted for permanent residence, in determining whether the applicant has established "good moral character" for the purpose of naturalization. 8 U.S.C. § 1427(e). In addition, Congress has specifically stated that an applicant who has given false testimony in order to obtain an immigration benefit is *precluded* from establishing good moral character. 8 U.S.C. § 1101(f)(6).

Section 241 (a)(1)(H) has no "good moral character" requirement. If it did, every applicant who had committed fraud in immigrating would be precluded from establishing good moral character pursuant to 8 U.S.C. § 1101(f)(6). The situation would be hopeless because the fraud waiver applicant would be precluded from receiving the waiver due to the very fraud he was seeking to waive.

Receiving a waiver does not mean that the alien is of good moral character, or that the misrepresentations have been "erased" for all purposes. The grant of the waiver merely means that the alien's *deportation* has been waived due to overriding equities and family ties. Disregarding an alien's pre- and post-entry concealment for the purpose of waiving deportation, yet requiring the alien to show a longer period of rehabilitation in order to qualify for naturalization would be entirely proper. This would be consistent with the intent of Congress in leaving out a "good moral character" requirement in the § 241(a)(1)(H) family waiver.

CONCLUSION

We are living in an era when immigrants are particularly unpopular. In spite of the immigrant bashing, certain humanitarian and compassionate provisions have been retained in the Immigration and Nationality Act. Asylum and withholding provisions in §§ 208 and 243(h), suspension of deportation for hardship cases in § 244(a), registry for long-term undocumented in § 249, and waivers for victims of spousal abuse in § 216(c)(4) are all examples of such provisions. The § 241(a)(1)(H) family waiver is no less central to the character of the humanitarian provisions of the Act.

The retention and viability of these humanitarian provisions are important for Congress to continue. They constitute statutory recognition that not only does deportation deprive a person of liberty, but it "may result also in loss of both property and life; or of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). Until Congress changes the language of a particular section of the Immigration and Nationality Act, we must continue to look at the plain language of the provision and the statutory structure. Because of the nature of deportation, "[m]eticulous care must be exercised" in cases of this nature. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

For the reasons stated in this brief, the decision of the Court of Appeals should be affirmed. The case should be remanded to the agency for a proper evaluation of the equities and misdeeds as required by the statute.

Respectfully submitted,

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